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MEDIA BRIEFING

REPORT *Pecuniary Penalties: Guidance for Legislative Design (R133, 2014)*

In its Report *Pecuniary Penalties: Guidance for Legislative Design*, the Law Commission concludes that pecuniary penalties are a legitimate regulatory tool when used appropriately. However, they need to be carefully designed so that they do not create a risk of unfairness or injustice.

What are they?

Pecuniary penalties are financial penalties that policymakers are increasingly opting to use, in place of criminal sanctions, in order to punish and deter misconduct in a number of regulatory regimes. They were first used in 1986 in the Commerce Act and now appear in 18 Acts of Parliament, including the Financial Anti-Money Laundering and Countering Financing of Terrorism Act 2009 and the Unsolicited Electronic Messages Act 2007. They are imposed by the courts, so enforcement agencies that have recourse to pecuniary penalties must seek them by bringing court proceedings.

The nature of pecuniary penalties

The Commission has concluded that pecuniary penalties are punitive in nature. They are designed to punish, so in this respect they resemble penalties imposed for criminal offences. However, they are imposed in civil proceedings. This means that the enforcement agency that is seeking the penalty is held to a lower standard of proof. The defendant to the proceedings does not have access to a general provision that protects them against the risk of self-incrimination, in the way that they otherwise would if they were being prosecuted for a criminal offence. The potential penalties in question are usually large - in some instances, up to $1 million for an individual and more than $10 million for a company.

On the other hand, defendants to pecuniary penalty proceedings cannot be imprisoned and will not have a criminal conviction.

Ultimately the Commission has concluded that pecuniary penalties are a legitimate regulatory tool in some contexts. They are a valid response to the demands of an increasingly complex society in which an increasingly broad range of conduct is regulated. They can be used as part of a regulatory regime that enables enforcement agencies to respond flexibly and appropriately to regulatory contraventions. However, the appropriate procedural protections must be in place.

Guidance for policymakers

The bulk of the Report covers best practice for policymakers who are considering including pecuniary penalties in a regulatory regime. There are 21 guidance points (all set out in Appendix A) which are intended to assist policymakers to use pecuniary penalties appropriately and with the proper procedural protections. The guidance covers matters such as:

- When it is appropriate to use pecuniary penalties (C*hapter 5*). The Commission concludes that the decision to do so should be based on a robust and transparent assessment of whether pecuniary penalties are an appropriate response to the particular contravention (*G3*).

- Whether it is appropriate to continue requiring enforcement agencies to prove contraventions on the balance of probabilities, rather than beyond reasonable doubt (*Chapter 7*). The Report concludes that, on balance, it is (*G4*). A defendant who is only pursued for a pecuniary penalty is not at risk of a criminal conviction. Enforcement agencies should not be required to prove a contravention beyond reasonable doubt.

- Whether the enforcement agency should always be required to prove the contravention, or whether in certain circumstances it is acceptable for a defendant to prove they did *not* commit the contravention (*Chapter 8*). The Commission concludes that usually the burden of proving all elements of the contravention should be on the enforcement agency. A defendant should only be required to prove something where that is reasonable and can be demonstrably justified (*G5*).

- Whether pecuniary penalty regimes need to address the risk of a defendant being punished twice for the same conduct ("double jeopardy") (*Chapter 10*). The Commission concludes that they do. Regimes should usually prohibit the imposition of two pecuniary penalties or a pecuniary penalty and a criminal penalty for the same conduct, and that once criminal proceedings have been concluded, it should not be possible to bring second proceedings for a pecuniary penalty for the same conduct, and vice versa (*G7*).

The Law Commission's recommendations

At present, the guidance in the Report does not have a formal status and policymakers are not required to take it into account when creating new pecuniary penalties. However, the Commission **recommends** that the guidance be included in the Legislation Advisory Committee's *Guidelines on Process and Content of Legislation* (*R2*). All legislation should comply with these Guidelines. The Commission also **recommends** that when a statute that contains pecuniary penalties comes up for review, its pecuniary penalties be evaluated against the guidance in the Report (*R4*).

The Law Commission also makes two other recommendations aimed at ensuring pecuniary penalties are well-designed: first, it **recommends** that the Ministry of Justice be consulted on

all proposals for pecuniary penalties at the policy development stage (*R1*); and second, it **recommends** that the Parliamentary Counsel Office draft model provisions (*R3*).

The Commission has also made two recommendations in relation to a defendant's right to be protected against the risk of exposing themselves to a pecuniary penalty; what it terms the "penalty privilege". This privilege exists at criminal law proceedings but the Commission concludes that it probably does not apply in pecuniary penalty proceedings. The Commission has concluded, however, that individuals should have the benefit of a "penalty privilege" when faced with pecuniary penalty proceedings, unless there is some justification to limit or modify that privilege. To give effect to this, the Commission makes two **recommendations**:

- The Evidence Act 2006 should be amended so that a penalty privilege of this nature will apply to all pecuniary penalties in existing regulatory regimes (*R5*).
- If any existing regime can demonstrate that it requires the privilege to be limited or modified, its statute should be amended at the same time (*R6*).

One consistent feature of pecuniary penalties is that they are set very high; in general even higher than standard criminal fines. There are certain regulatory principles that can justify the use of high penalties in some instances. However, at present there is a great degree of inconsistency across different regimes and no methodology for setting penalty amounts in statute. Nor do criminal law penalties provide useful guidance because they too have been set fairly unsystematically (C*hapter 16*). The breadth of the issue is wider than the Law Commission can cover in this Report, so it **recommends** that the Government instigate a dedicated review of how maximum criminal and pecuniary penalties are set down in legislation, drawing on legal principle and economic theory (*R7*).

All the current pecuniary penalty statutes purport to bind the Crown. The Crown and its employees could potentially be liable for pecuniary penalties where they participate in the activity that is regulated by the statute (*Chapter 19*). This is a pertinent issue and the Commission **recommends** that Cabinet consider making it a requirement that, for any new pecuniary penalty regime, its potential impact on Crown liability must be considered (*R8*).

Enforcement agencies that have recourse to pecuniary penalties (such as the Commerce Commission and the Financial Markets Authority) are responsible for commencing the court proceedings that seek the penalty. Those enforcement decisions must be made transparently, consistently, and responsibly (*chapter 20*). The Commission **recommends** that all enforcement agencies that have the power to seek pecuniary penalties should publish policies setting out how they will do this (*R9*).